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No. 90-431

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1990

STATE, *ex rel.*
THE DISPATCH PRINTING COMPANY,
Petitioner,

vs.

THE HONORABLE RONALD L. SOLOVE
and DAVID L. STRAIT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Ohio properly considered the First Amendment when it applied the standard set forth by this Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), in weighing the tradition of confidentiality which Ohio affords to juvenile records and proceedings against any significant positive role which public and press access contributes to the functioning of the juvenile process.

2. Whether the Supreme Court of Ohio properly upheld a gag order imposed upon counsel and parties during the pendency of juvenile custody and dependency proceedings where the Court found that the actions of the parties created a risk to the child and endangered the fairness of the adjudication.

LIST OF PARTIES

The petitioner in this case is The Dispatch Printing Company. Respondent David L. Strait is the court-appointed guardian ad litem for the minor child, Tessa Reams. Respondent, the Honorable Ronald L. Solove, is a Judge of the Franklin County, Ohio Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

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RESPONDENT'S BRIEF IN OPPOSITION
STATEMENT OF THE CASE

Tessa Reams was born January 12, 1985, to Lee Stotski through artificial insemination by unrelated donor. Stotski had previously entered into a contractual arrangement with Richard and Beverly Reams to be a surrogate mother for the couple in exchange for \$10,000. The Reames took custody of Tessa shortly after her birth, but never formally adopted her.¹

¹ Separate adoption petitions were filed by Reams and Seymour in the Probate Court of Franklin County, Ohio, in October and November, 1988. Both petitions were subsequently dismissed.

Approximately one year later, Richard and Beverly Reams were divorced. While each sought to retain custody of Tessa, Ms. Stotski, in light of the Reams divorce, also decided to pursue custody of the child.

In September, 1987, in an effort to obtain custody of Tessa, Beverly Reams (now Seymour) filed a custody action in the Franklin County Juvenile Court. David Strait, the court-appointed guardian ad litem, subsequently filed a complaint alleging that the minor child was a dependent minor child, as defined by Ohio Rev. Code §2151.04.² The actions were consolidated before the trial court. The orders challenged by petitioner were issued in the consolidated action before the juvenile court.

Stotski's arrangement with Reams and Seymour and the subsequent dispute regarding custody of Tessa have been the subject of extensive coverage by the print and broadcast media. The proceedings generated numerous stories and pictures of Tessa in *The Dispatch* and other local media, as well as substantial national media coverage, including a lengthy story in the *New York Times*, a six-page feature in *People Magazine* including numerous photographs of Tessa, national media coverage on the program "A Current Affair," and a full page article in the *Star Magazine*. The *Star* article on "Baby Tessa" included a contest in which the readers would determine "Who Owns Baby Tessa." Seymour and

² Contrary to the assertion of petitioner, the dependency complaint was filed not in an effort to discourage the parties from speaking with the media but because the minor child was dependent as defined by Ohio law and as the guardian ad litem deemed that the dispositional alternatives offered in such action would provide the juvenile court with the flexibility to fashion an appropriate resolution of the controversy. It should be noted that on October 3, 1990, Judge Solove found the child to be both dependent and neglected upon the same allegations set forth in the previous dependency filing.

Stotski were tentatively scheduled to appear on the "Geraldo Rivera" show but were prevented by the February 27, 1989 order that the parties not disseminate information regarding Tessa or the proceedings.

On February 21, 1989, Judge Solove, conducted a hearing on motions by Tessa's guardian ad litem for a gag order in each case. Testimony was presented from Stotski, Andrea Yagoda (then counsel for Reams), Seymour and Dr. Jo Ann King, a licensed psychologist. Dr. King testified, based upon her education and experience in dealing with children of parents involved in custody disputes, some of whom were subjected to extensive publicity, that substantial media coverage was adverse to the best interests of children. Dr. King noted that in younger children, substantial media coverage was traumatic and caused emotional problems. Counsel for The Dispatch did not participate in the February 21 hearing. The Dispatch's courthouse reporter was present, but declined to make a statement. A representative of Fox Broadcasting, who was permitted to film portions of the hearing for a segment on "A Current Affair," addressed the court prior to and following the testimony of the witnesses. On February 27, 1989, Judge Solove entered identical gag orders in each of the juvenile cases.³ None of the parties to the juvenile court proceedings challenged the orders or requested separate findings of fact or of law.

On February 17, 1989, the guardian ad litem for Tessa Reams filed motions to exclude the public and the media from any and all hearings in the *Tessa Reams* proceedings and to prohibit the media and the public

³ The trial judge determined that an earlier order which prohibited the parties from exposing the child to direct media contact was insufficient to protect the child.

from having access to any and all court files regarding those cases. A hearing was held on those motions on March 8, 1989, in which counsel for The Dispatch was permitted to participate.

At the March 8 hearing, Judge Solove heard testimony from three witnesses: the Director of Social Services of the Franklin County Public Defender, the courthouse reporter for The Dispatch, and the Managing Editor of The Dispatch. Judge Solove received documentary evidence and heard arguments from counsel for the parties, from the Prosecuting Attorney for Franklin County, and from counsel for The Dispatch.

Jamie Schmerbeck, the Director of Social Services at the Public Defender Office testified, based upon her interviews with the child and all the other parties, that she was concerned with the effect of the negative coverage of the parents upon the child. Ms. Schmerbeck indicated that as the media exposure increased, so would the potential for the child to suffer harm.

On March 10, 1989, Judge Solove issued a Decision and Judgment Entry and Order on the motion to close the proceedings. Judge Solove directed that all proceedings in the *Tessa Reams* cases be closed to the public and the media and that all records related thereto be sealed.

The Dispatch Printing Company appealed the orders issued by Judge Solove, and also filed petitions for writs of prohibition and mandamus, in the Franklin County Court of Appeals. By order of the Court of Appeals, the guardian ad litem for the minor child was permitted to intervene as interested parties in the prohibition and mandamus actions. In a decision rendered on May 25, 1989, the Franklin County Court of Appeals found that

the closure was not supported by a finding of a substantial probability "that permanent harm will result to the minor child as a result of trial publicity, or that substantial or severe temporary harm will result to the child, which will have an enduring effect." *State, ex rel. The Dispatch Printing Co. v. Solove* (May 25, 1989), Franklin App. Nos. 89AP-323, 331, 332, unreported at 28. As a result, the Court issued writs of prohibition on both the February 27 gag order and the March 12 closure order. The Court further determined that the Dispatch was a party to the March 12 hearing and reversed the judgment of the trial court on the direct appeal. The direct appeal of the February 27 order was dismissed as the counsel for The Dispatch was not present to take part in those proceedings.

On July 26, 1989, the guardian ad litem filed a notice of appeal to the Ohio Supreme Court with respect to the writ of prohibition, an original action in the Court of Appeals. Additionally, the guardian ad litem sought leave to appeal the reversal of the closure order on direct appeal to the Franklin County Court of Appeals.

In a decision rendered on June 13, 1990, the Ohio Supreme Court reversed the decision of the Court of Appeals and held that:

"Proceedings in juvenile court to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child, are neither presumptively open nor presumptively closed to the public. The juvenile court may restrict public access to these proceedings pursuant to Juv. R. 27 and R.C. 2151.35 if the court finds, after hearing evidence and argument on the issue, (1) that there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the adjudication, and (2) the

potential for harm outweighs the benefits of public access." *In re T.R.*, 52 Ohio St. 3d 6 (1990), in syllabus.⁴

Additionally, the Court upheld Judge Solove's decision to impose a gag order and noted that concerns for the child and interest in protecting the proceedings "must again be balanced against the public's interest in observing Judge Solove's courtroom and the media's right to gather news. We find that Judge Solove did not abuse his discretion in deciding to impose a gag order." *In re T.R.*, *supra*, at 23. The Court did find, however, that the gag order was overly restrictive as it prohibited the parties from discussing the child with all persons, including teachers and doctors. The Court directed that Judge Solove modify the order to achieve its purposes without unduly restricting the parties and counsel from meeting their responsibilities.

On August 14, 1990, the closed custody hearing commenced before Judge Solove.⁵ Following the hearing, the Court awarded legal custody of the minor child to

⁴ Although petitioner cites to the consolidated cases as *State, ex rel. The Dispatch Printing Company v. Solove*, the case herein was reported by the Ohio Supreme Court as *In re T.R.*.

⁵ Shortly before the commencement of the custody trial, petitioner filed a motion requesting that the court consider a "workable" less restrictive alternative to complete closure. Petitioner argued that it should be permitted to attend opening and closing statements of counsel, the testimony of witnesses recounting the underlying facts leading to the present custody dispute, the legal arguments contained in any motions or briefs submitted to the Court, any legal arguments made in hearings on motions or made in an identifiable portion of the proceedings, and any rulings made by the Court. In his argument to the court in support of the motion, counsel for petitioner conceded that the court already determined that the child could be harmed through continued coverage but argued that the parties be instructed not to discuss sensitive issues in opening and closing statements to the court so as to permit the press to attend and record the proceedings for the benefit of its readers. Judge Solove denied the request and scheduled for hearing the written motions filed by the guardian ad litem and Richard Reams for sanctions. The motions were later denied.

Richard Reams and granted liberal visitation to Beverly Seymour. When Mr. Reams attempted to collect Tessa after a weekend visitation, Richard Reams was shot and killed by Beverly Seymour.

Following the shooting death of Richard Reams, a request by petitioner for access to the transcript of the custody trial was granted by Judge Solove.*

A petition for writ of certiorari was filed by The Dispatch Printing Company on September 11, 1990, and was received by respondents on September 14, 1990.

* Judge Solove's decision to release the record of the trial was motivated in part by reports in *The Dispatch* which charged that Beverly Seymour was motivated to shoot her ex-husband because of her loss of confidence in the integrity of the court proceedings. Although the statement was inaccurate and self-serving on the part of Ms. Seymour, the allegation provided petitioner with leverage in securing access to the record.

REASONS FOR DENYING THE WRIT

I. The Ohio Supreme Court Properly Considered and Applied the First Amendment in Creating the Standard for Determining Access of the Public and Press to Juvenile Proceedings.

Petitioner's request for review is based upon the assertion that the Ohio Supreme Court determined that the First Amendment did not apply to dependency, neglect, abuse, and child custody proceedings in juvenile court. Such contention is incorrect. A more accurate summary of the holding is that the Ohio Supreme Court found that the First Amendment did not create a presumption of openness in state juvenile proceedings. The Court also concluded that the tradition of confidentiality which is historically found in Ohio and which is clearly protected by both statutes and rules did not create a presumption of closure. The Supreme Court relied upon the test set forth by this Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) ("*Press-Enterprise II*") to balance First Amendment interests against the tradition of confidentiality to determine the circumstances under which access is either permitted or denied.

In *Press Enterprise II*, this Court held that the analysis of a First Amendment claim of access involves two "complimentary considerations." First, the proceeding must be one for which there has been a "tradition of accessibility." This inquiry requires a court to determine "whether the place and process [to which access is sought] has historically been open to the press and general public." Second, public access must play a "significant positive role in the functioning of the particular process in question." *Press Enterprise II*, 478 U.S. at 13-14. See also, *Globe Newspaper Co. v. Superior*

Court, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). The Ohio Supreme Court applied this analysis and noted that "the public's qualified right of access attaches to those hearings and proceedings in all courts which have historically been open to the public, and in which public access plays a significant positive role." *In re T.R.*, 52 Ohio St. 3d 6, 556 N.E.2d 439 (1990). The Ohio Court then proceeded to balance the benefits of public access to juvenile proceedings against the traditions of protection and confidentiality which have historically been recognized in Ohio. In reaching its decision, the Ohio Supreme Court applied relevant statutory provisions and considered the manner in which juvenile courts developed in the state. The Court concluded that juvenile proceedings, unlike criminal proceedings, did not have a tradition of access. While it was appropriate to require a demonstration of an overriding interest in criminal proceedings to justify closure, juvenile records and hearings have not been historically open.

To suggest that the First Amendment was found not to apply to juvenile proceedings is to grossly misstate the holding of the court below. Had the Ohio Court failed to consider First Amendment interests, there would have been no discussion of this balancing test. The Court would have permitted Ohio juvenile judges to close proceedings without considering evidence or providing those seeking access an opportunity to be heard.⁷ The

⁷ That the Ohio Supreme Court applied a First Amendment balancing test is obvious from the language of the decision below. The Court noted that if the public's interest in access is not considered, then closure of proceedings could be justified in all cases. According to the Court, "given the policies behind the juvenile court's lengthy history of confidentiality, it is possible to reasonably argue that public access is *never* in any child's best interest. We believe these standards give insufficient weight to the public's interest in access." *In re T.R.*, *supra* at 18.

Ohio Supreme Court held to the contrary, expressly applying the *Press Enterprise II* balancing test and weighing the competing considerations. The Court determined that a different standard should apply to closure decisions in juvenile proceedings than that relied upon in criminal hearings. In doing so, the Ohio Supreme Court correctly applied the sound legal standards established by this Court.

A. The standard created by this Court in *Press Enterprise II* provides an adequate test by which each state can balance First Amendment concerns against its tradition of accessibility to juvenile proceedings and its perceived need for confidentiality.

While this honorable Court has never directly considered the issue of public and press access to child protective and custody actions in juvenile court, such a review is unnecessary. This Court has indicated a reluctance to recognize a blanket presumption of openness for all court hearings. Clearly, the public's right of access varies with the nature of the proceedings and whether access plays a significant positive role in the functioning of the process. Respondent would submit that pursuant to the balancing test set forth in *Press Enterprise II*, the historical development of each court and the tradition of confidentiality of each type of hearing must be considered in relation to the interest to be served through public access. The competing interests of individual states may vary with respect to juvenile hearings because the tradition of confidentiality of juvenile courts may differ between states. Each state has developed separate rules restricting access to juvenile records and hearings. Approximately two-thirds of the states provide that dependency, neglect, and abuse

hearings shall be closed to the public and press. The remainder of the states differ as to the discretion afforded judges. As a result, separate inquiries must be made, and different standards concerning access could result. The *Press Enterprise II* balancing test provides sufficient guidance to the states in applying First Amendment principles to their respective circumstances.

The United States Supreme Court has never extended the "substantial probability of harm" standard to determine the appropriateness of releasing juvenile records or of permitting access to juvenile proceedings, nor has the Supreme Court applied such a standard to grand jury hearings, adoption proceedings, court martial proceedings or to numerous other matters which have had a tradition of closure or of confidentiality. The "substantial probability of harm" standard was created for use in and has been applied to adult criminal proceedings, voir dire proceedings, and preliminary hearings—all of which have had a tradition of openness. In a concurring opinion in *Globe Newspaper, supra* at 611, Justice O'Connor indicated, "I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials."

Access to proceedings has always depended upon whether there has been a tradition of openness and whether public access plays a significant positive role in the functioning of the process. Hearings which require confidentiality due to their nature have been exempted. As a result, federal courts have uniformly rejected attempts to gain access to grand jury reports and proceedings. With respect to records, the First Amendment "attaches only to those records connected with proceedings about which the public has a right to

know." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989). See *In the Matter of New York Times*, 828 F.2d 110, 114 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 1272 (1988). With respect to grand jury hearings, this Court has repeatedly made clear that the public has no right to attend grand jury proceedings. In contrast to criminal trials, "grand jury proceedings have traditionally been closed to the public and the accused." *Press Enterprise II*, 478 U.S. 1, 10. The basis for such a holding is that "[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). See also *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983).

Courts have uniformly denied direct challenges by the press to the tradition of closure in grand jury proceedings. *Globe Newspaper Co. v. Pokaski*, *supra*; *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989); *United States v. Haller*, 837 F.2d 84 (2nd Cir. 1988); and *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989). In *Times Mirror Co.*, the press sought access to search warrants and supporting affidavits relating to a pre-indictment investigation and argued that self-governance and the integrity of the criminal fact-finding process would be served by opening the proceedings and records. While the Court noted that all government functions arguably benefit from public scrutiny to some degree, it determined that complete openness would undermine important values that are served by keeping some proceedings closed to the public. "[B]ut because the integrity and independence of these proceedings are threatened by public disclosures, claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to

the public. Nor will the mere recitation of these interests open a particular proceeding merely because it is in some way integral to our criminal justice system." *Times Mirror Co.*, *supra* at 1213.

Because of the potentially damaging effect that unlimited public access can have on all court hearings, this Court "has implicitly recognized that the public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public." *Times Mirror Co.*, *supra* at 1213. Certain hearings have historically been accepted as being outside the range of free public access. The philosophy of an open court system was intended to operate within this balance and not in reckless disregard to the effect on the purposes to be achieved by the proceedings. Such a balancing of interests was made by the Ohio Supreme Court in the present case and was properly resolved in favor of protecting the privacy of minor children who were alleged to be abused, neglected, and dependent and who were brought before the juvenile court for protection.

Although this Court emphasized the tradition of openness in adult criminal proceedings and in certain civil actions, this Court noted in the case *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948), that there were exceptions to the general rule regarding open hearings:

Cases within the jurisdiction of courts martial may be regarded as an exception. *Ex parte Quirin*, 317 U.S. 1; *King v. Governor of Lewes Prison*, 61 Sol. J. 294, 30 Harvard L. Rev. 771. Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel. *Oliver*, *supra* at 266, n. 12.

Even while extending certain due process protections to the adjudicatory process in delinquency cases, this honorable Court has not found it necessary to disturb the historical privacy of juvenile hearings. *In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). In *Gault*, *supra* at 25, this Court noted that "there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." In essence, the Court has sought to preserve the most beneficial aspects of traditional juvenile court process while introducing procedural guarantees consistent with the constitutional mandate of fundamental fairness. See, *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

In a concurring opinion in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 107, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979), then-Justice Rehnquist reiterated the Supreme Court's concern for maintaining the confidentiality of juvenile proceedings: "The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State." *Daily Mail Publishing*, 443 U.S. at 107.

Thus, even in cases involving delinquent activity, there is a strong policy of confidentiality. The present case, however, involves a dependent minor child. The interest of society in protecting dependent, neglected, and abused children is substantially higher as they are themselves victims and in need of care and protection.

To declare that the doors of juvenile court must be presumptively open to the public would fundamentally alter the nature of its proceedings and render meaningless Ohio's policy of protecting the privacy of the children subject to its jurisdiction. Contrary to the intent of Ohio Rev. Code §2151.18(B)(7), the identity of parties before the court would routinely become a matter of public knowledge.⁸ The media would be free to report the content of testimony offered in any hearing, notwithstanding the provisions of Ohio R. Juv. P. 37(B) prohibiting public use of juvenile court records, since such information would be lawfully obtained by the media as a matter of right.

B. State courts have reached conflicting decisions concerning closure of juvenile proceedings as the tradition of accessibility varies between states.

Under the rationale of *Press Enterprise II*, each state would be expected to balance the public right of access with the tradition of confidentiality extended to its juvenile courts. Juvenile courts are a creation of individual states.⁹ Each state has developed separate provisions and standards which control the operation of its juvenile court. As each state must make a separate determination based upon its history of confidentiality and protection, different standards would be expected.

⁸ At the evidentiary hearing held prior to the issuance of the closure order, *Dispatch* reporter Michael Berens testified that the names of juveniles are routinely used in newspaper articles as they are considered to be major facts of the stories.

⁹ The first juvenile court statutes were enacted in Illinois in 1899. Legislation creating a juvenile court for Cuyahoga County (Cleveland) was adopted by the Ohio General Assembly in 1902, with subsequent legislation in 1904 and 1906 conferring the juvenile jurisdiction on courts throughout the state. See generally Young, *A Synopsis of Ohio Juvenile Court Law* (1962), 31 U. Cin. L. Rev. 131 (1962).

C. The Ohio Supreme Court properly considered the First Amendment in determining the circumstances under which juvenile judges can limit access to dependency, neglect, abuse, and child custody proceedings in juvenile courts.

Historically, the juvenile court system in Ohio has developed to ensure the "care, protection, and mental and physical development of children" and "to protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts." Ohio Rev. Code §2151.01(A) and (B). Moreover, the Supreme Court has developed procedures designed "to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court" and "to protect the public interest by treating children as persons in need of supervision, care and rehabilitation." Ohio R. Juv. P 1(B)(3) and (B)(4).

The basis for the creation of this separate court system with its own rules and procedures has been to protect juveniles from the formality and stigma of adult proceedings. In *In re Agler*, 19 Ohio St. 2d 70, 80, 249 N.E.2d 808 (1969), the Ohio Supreme Court noted that "[t]he very purpose of the Juvenile Code is to avoid treatment of youngsters as criminals and insulate them from the reputation and answerability of criminals. *** Like indictment, the privacy of juvenile proceedings in themselves offers protection to a child from the adverse effect of groundless charges upon his reputation."

In an effort to spare them from the stigma and formality of the adult system, juveniles in Ohio have been denied the right to trial by jury [*Agler, supra*], the right to be charged by indictment [*Agler, supra* at 80], the right to bail [*State ex rel. Peaks v. Allaman*, 115

N.E.2d 849, 51 Ohio p. 321 (1954); Ohio Rev. Code §2151.46], and the statutory right to a speedy trial [*State, ex rel. Williams v. Court of Common Pleas of Lucas County*, 42 Ohio St. 2d 433, 329 N.E.2d 680 (1975)].

The confidentiality of juvenile records and proceedings has traditionally been protected. In the decision below, the Ohio Supreme Court noted that juvenile proceedings may be closed at the discretion of the juvenile judge pursuant to Ohio R. Juv. P. 27 and Ohio Rev. Code §2151.35. The Court specifically found that "[j]uvenile court records are confidential. Ohio R. Juv. P. 37(B); see, also, Ohio R. Juv. P. 32(B) (mental and physical examinations of children pursuant to court order may not be used for other purposes); Ohio Rev. Code §2151.18(B) and (C) (those juvenile records which are open to the public shall not include the identity of any party to a case); Ohio Rev. Code §5153.17 (records of investigations by public children's services agencies on abused, neglected, and dependent children are confidential)." *In re T.R.*, at 15.¹⁰

The standard which petitioner seeks to apply to juvenile proceedings prevents judges from protecting those children who appear before them. It is first and foremost a standard which cannot realistically be met. A guardian ad litem, seeking to close proceedings to the public, would be required to demonstrate that there is a "substantial probability" that a child would be harmed if the hearings remain open. If the closure motion is filed prior to the release of sensitive information, an expert

¹⁰ In addition, the Court noted that the effectiveness of the statutes and rules mandating confidentiality of records would be destroyed if the public were allowed access to the proceedings in which the confidential records are generated. *In re T.R.*, at 16.

could only speculate as to nature of the media coverage and estimate the potential damage. It would be impossible to produce testimony as to a "substantial probability" of the future harm. Even more importantly, however, the standard ignores the ultimate goal to juvenile proceedings—that of protecting children. Once sensitive information is released, an expert could testify regarding the damage a child has sustained. Unfortunately, by that time, the child has been effectively denied protection and has suffered needless additional injury. As the Ohio Supreme Court reasoned:

"The 'substantial probability' standard gives insufficient weight to this interest, leaving the juvenile court unable to prevent an innocent child from being made a public spectacle and being psychologically maimed by the very process which is intended to help the child." *In re T.R.*, at 18.

Petitioner is, in essence, seeking the creation of a standard which could not be proven until some sensitive information is released. Once such information is disseminated, petitioner would contend that any unfortunate damage has already occurred and that there remains no justification for an order restricting further access. While such a standard would certainly serve petitioner's economic interest, it undermines the goals of juvenile hearings. Detailed reporting of the circumstances, the names, addresses, and often photographs of alleged abused, neglected, and dependent children is potentially far more damaging than the harm the juvenile courts seek to prevent.

At the same time, there is limited public interest to be served through such coverage. All parties in juvenile proceedings are guaranteed a right to counsel [Ohio Rev. Code §2151.352 and Ohio R. Juv. P. 4], and the right of appellate review provides an effective check on excessive

actions of judges.¹¹ The public interest in being informed of the workings of adult civil and criminal proceedings does not extend in the same manner to children who are brought before juvenile courts to address specific needs. There is a strong public interest, as recognized by the legislature by statute and the Supreme Court by rule, in protecting those minors who in many cases can not provide for their own protection. Moreover, it is the actual dissemination of information which results in damage to minors. Adults can be insured a fair trial through a change of venue where pre-trial publicity is so severe as to affect the outcome of proceedings. On the other hand, once sensitive, personal information concerning a child is released into the community in which that child is to reside, there can be no appropriate remedy.

¹¹ Petitioner's suggestion that the lower court decision to close the proceedings and to order the parties not to release information concerning the minor child contributed to the death of Richard Reams (Petition for Writ of Certiorari at page 18) is highly inaccurate, irresponsible and inflammatory. Such an allegation was also made in two articles published by petitioner (The Columbus Dispatch, Aug. 30, 1990 at 1A, and an editorial entitled "Who Failed Tessa Reams," The Columbus Dispatch, September 4, 1990) even though petitioner had not yet had an opportunity to review the transcript of the custody hearing. The claim is certainly in conflict with petitioner's lofty and oft cited goals of accurately informing the public and promoting public confidence in the integrity of the courts.

The Ohio Supreme Court conducted an exhaustive examination of the competing interests concerning public access to juvenile proceedings and created a standard based upon the rationale of *Press Enterprise II* and which incorporated the historical development of juvenile courts in Ohio. Petitioner's assertion that the Ohio Supreme Court held that the First Amendment did not apply to juvenile proceedings is inaccurate and based upon a superficial reading of *In re T.R.*¹²

¹² In formulating its syllabus rule, the Ohio Supreme Court stated that the "proper standard is one which gives due deference to both the limitations of our ability to predict harmful consequences which may result from public access and the public's interest in learning about and scrutinizing the working of the juvenile court." *In re T.R.*, at 18. The Court balanced those concerns in creating a test which requires a showing of potential harm to the child or a danger to the fairness of the proceeding which outweighs the benefits of public access.

II. The Ohio Supreme Court Properly Applied First Amendment Considerations in the Context of State Juvenile Court Proceedings. The Orders Issued by the Trial Judge, Which Prohibited the Parties from Disseminating Information During the Pendency of the Proceedings, Was Not an Unconstitutional Prior Restraint.

The order imposed by Judge Solove clearly did not prevent the media from reporting any facts which were already in its possession, nor from reporting any information which it could obtain from *any* source. The restriction was limited to information released by the parties and their counsel. None of the parties affected by the order challenged the trial court's directive before the appellate courts. Petitioner sought relief from the order as it contended that its right of access to the parties outweighed the interest of the court in protecting the minor child and the confidentiality of the proceedings. As in the issue of closure, the Ohio Supreme Court balanced the First Amendment against the interests of confidentiality and of protection for the minor child. The Court did not impose a blanket gag order which affected all juvenile proceedings nor did the Court extend to juvenile judges a power to restrict the parties beyond the pendency of the proceedings. Based upon the nature and historical development of the proceedings and the broad power given to juvenile courts to restrict the actions of parties, as set forth in numerous statutory enactments, the Supreme Court determined that the gag order imposed in the present case was valid. The Ohio Supreme Court more than satisfied comparable weighing of interests as utilized in *Butterworth v. Smith*, _____ U.S. _____, 110 S. Ct. 1376 (1990). In *Butterworth*, this Court held a Florida statute prohibiting witnesses from ever disclosing testimony given before a grand jury

was unconstitutional insofar as it prohibited witnesses from disclosing their own testimony after the grand jury term ended. A unanimous court declined to invalidate a blanket prohibition on release of information during the grand jury term as it served valid state interests relating to the nature of the proceedings and did not violate the First Amendment.

The Ohio Supreme Court determined that the gag order was well within the authority of the judge, as authorized by both state statute and rule. The order was in response to actions by the parties which the judge properly found would harm the child and disrupt the proceedings. Under Ohio law, a juvenile judge has the power to issue temporary orders following the filing of a dependency action to protect the best interests of a child. Pursuant to Ohio Rev.Code §2151.33(B)(7), the court may issue any order "that restrains or otherwise controls the conduct of any party which conduct would not be in the best interest of the child." In addition, Ohio R. Juv. P. 13(A) permits the court to make temporary orders concerning the care of the child, and Ohio R. Juv. P. 13(B) authorizes the issuance of orders with respect to the relations and conduct of other persons toward a child who is the subject of a complaint. Both the statutes and the rules are to be liberally construed to protect the interests of children. Ohio Rev. Code §2151.01 and Ohio R. Juv. P. 1(B).

The validity of the order of the trial court must be evaluated in light of the tradition of confidentiality found by the Ohio Supreme Court to be associated with juvenile proceedings and the broad powers granted by the Ohio General Assembly to protect the interests of children. The Ohio Supreme Court noted that even in proceedings which are presumptively open, orders which

are effectively prior restraints have been used to protect a criminal's right to a fair trial, to secure a litigant's confidentiality interest in information subject to civil discovery, and to protect the privacy interests of parties in sensational cases. In finding that juvenile proceedings are not presumptively open, the Ohio Supreme Court held that a juvenile judge has the power to control extrajudicial comments by the litigants in a fashion consistent with the standard created by the Court. *In re T.R.*, at 21. Contrary to petitioner's assertion that there had been no First Amendment scrutiny, the Supreme Court's standard properly balanced First Amendment considerations with the tradition of confidentiality and the need for protection of minors in dependency, neglect, and abuse actions in juvenile court. The Supreme Court determined that there was a substantial interest in preserving the confidentiality of records and proceedings and recognized that in order to achieve the goals of the state's juvenile system, a juvenile court judge had greater power to control the conduct of the parties than in criminal proceedings.

The Ohio Supreme Court permitted the restriction on parties and their counsel as a less intrusive alternative to restrictions imposed directly on the media. *In re T.R.*, at 21, citing *National Press Assn. v. Stuart*, 427 U.S. 539, 564, 96 S. Ct. 279, 49 L. Ed. 2d 683 (1976). The Ohio Supreme Court correctly found that application of this restriction was necessary to protect the best interests of the child and to ensure the integrity of the proceeding. The Court reasoned that, "the un rebutted expert testimony *** that intensive coverage of custody disputes is detrimental to children, and the sensationalist tone of some of the reporting" was sufficient to justify the restriction. *In re T.R.*, at 22.

This Court noted in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), that it is the responsibility of the trial judge to take steps to reduce the prejudicial effects of extensive publicity by, among other techniques, controlling the release of information which may damage the defendant's right to a fair trial. The actions of Judge Solove were consistent with that philosophy and were properly affirmed by the Ohio Supreme Court.

CONCLUSION

Child protective proceedings and custody cases are inherently different from other types of legal actions. Unlike the parties to typical civil and criminal cases, the child does not find herself before the court as a consequence of her own actions. Rather than penalizing criminal conduct or providing redress for civil wrong, child protective proceedings are correctly designed to protect the best interest of the child, and, where appropriate, to fashion a disposition or order designed to ameliorate the conditions that brought the child to the attention of the court.

To accomplish this objective, juvenile and family court judges have historically been vested with the discretion to issue orders to restrain conduct that is damaging, or potentially damaging, to the child. The holding of the Ohio Supreme Court does not break with prior juvenile law, nor does it contravene the precedent set forth by this Court on the issue of media access. The Ohio court correctly interpreted and applied the *Press Enterprise II* standard, and determined that no blanket presumption of openness attached to child protective proceedings. This is in accord with prior law. As the Ohio Supreme Court did not break with controlling precedent, but rather correctly applied it, a writ of certiorari should not issue here. Where the state of the law is sufficiently clear, and has been settled by this Court, certiorari should not be granted. *Burrell v. McCray*, 426 U.S. 471, 96 S. Ct. 2640, 48 L. Ed. 2d 788 (1976).

Moreover, a specific policy reason militates against grant of the requested writ. The minor child at issue in these proceedings has been the subject of litigation since 1985. Only recently has the Franklin County Juvenile Court made a determination that will disentangle the child from the legal snarl in which she has lived nearly all of her life. While the grant of certiorari would provide this Court with an opportunity to restate well-reasoned prior holdings, there would be a cost: the grant of the writ would also provide the Petitioner with yet another opportunity to exploit the name of the child in an effort to accomplish its own agenda. It is time for the litigation and exploitation to end; it is time for the child to live a normal life away from the courts and the cameras.

For the foregoing legal reasons, as well as the last-mentioned humanitarian concern, Respondent urges this Court to deny the requested writ of certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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